IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, Plaintiff, vs. FLEMING COMPANIES, INC., et al., Defendants.	CV 01-00446 SPK-LEK Honolulu, Hawaii March 5, 2003 9:00 A.M. Settling of Instructions

PARTIAL TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	TIMOTHY J. HOGAN, ESQ. Lynch Ichida Thompson Kim & Hirota First Hawaiian Tower 1132 Bishop St., Ste. 1405 Honolulu, HI 96813
For the Defendant Fleming Companies, Inc.:	LEX R. SMITH, ESQ. ANN C. TERANISHI, ESQ. Kobayashi Sugita & Goda First Hawaiian Center 999 Bishop St., Ste. 2600 Honolulu, HI 96813
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Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

Exhbit B

WEDNESDAY, MARCH 5, 2003 9:39 O'CLOCK A.M.

(In open court without the jury:)

THE CLERK: Civil 01-00446 SPK, Wayne Berry versus Fleming Companies. This hearing has been called for Objections to the Jury Instructions.

Counsel, your appearances for the record, please.

MR. HOGAN: Timothy Hogan on behalf of the plaintiff Wayne Berry, who is also present.

MR. SMITH: Lex Smith and Ann Teranishi for Fleming. Ralph Sussi is also present from Fleming Companies.

THE COURT: We have a proposed special verdict form, and the insertion of the exhibit numbers, that's not objectionable. 221, 222, 223.

MR. HOGAN: That's acceptable, Your Honor.

THE COURT: Now we come to the word "purchased" in paragraph 2 of each of the A, B, C verdict forms, referring to different software systems. And I've changed the word "purchased" to "had" in each case. You want to be heard about that?

MR. HOGAN: Yes. I think probably just on the issue -- I understand the court is inclined to go this way. Because the use of "had" gives it a past tense, Your Honor, that at least we're talking about current use. And

I believe that they have to have it; so I think it should be "has."

And that's relevant, Your Honor, on the issue of rescindment. If it was rescinded, which we will attempt to argue to the jury, they don't have one, but they did -- they had one once. So for that purpose I think that, if we can just agree that it goes to "has," then we're not knocking out rescission as one of the things we can argue to the jury effectively.

THE COURT: That it "has"?

MR. HOGAN: "Has," Your Honor. So if it lost it, it no longer has it.

THE COURT: Have?

MR. HOGAN: But something that would make it not past tense that would essentially say -- the jury could be confused thinking, well, they had one during the period of time that the EULA was alive.

THE COURT: Want to change "had" to "has"?

MR. SMITH: No objection, Your Honor.

THE COURT: Okay. We'll make it "has" in each case.

Now, in -- also as to each section of the verdict form relating to software, I've stricken what was question number 4, "Was the infringement of the freight control software copyright willful? Yes. No. Go to the

next question." I've stricken that.

And again, "Was the infringement of the Crystal Reports software copyright willful? Yes. No. Go to the next question." I've stricken that.

And again, "Was the infringement of the FlemingPO.exe software copyright willful? Yes. No. Go to the next question." I've stricken that.

MR. HOGAN: Your Honor, if I may be heard. First, we elected statutory damages on the belief that we'd get to the jury on willfulness. We're already here. I just want to put on --

THE COURT: You can change your mind now if you want to.

MR. HOGAN: Let's address the instruction, Your Honor, at least as to the language, if I may. Let me try to appeal to you to reconsider your decision on the issue of willfulness, if I may first, Your Honor, if the court will permit me.

The instruction that the court -- it was number 49 and 51, which makes it the third from the last -- adopted language that we had placed in our second set of instructions that basically gives to the jury the decision of whether something was willful. If you recall the case -- the Feltner case, Your Honor, that the Supreme Court ruled that issues of statutory damages are jury

issues, Your Honor. And I believe the issue of willfulness, if there's any evidence at all, should go to the jury.

The language says, "An infringement was willful when the defendant engages in acts that infringe the copyright and knew that those actions may infringe the copyright."

Part of our case, Your Honor, is Mr. Dillon taking source code, despite his testimony, and creating an illegal derivative. Nothing could be more willful than that. If he took source code and copied it, Your Honor -- and his testimony was that he didn't, but our expert says he did. And because of that, Your Honor, there is no way to look at that other than as a willful infringement.

THE COURT: Which instruction is that again?

MR. HOGAN: That would be the actual -- the one that you were going to bifurcate, Your Honor. It's on 49 and 51, which I believe would put it third from the last.

THE COURT: Yeah.

MR. HOGAN: That's the instruction that the court had prepared that was, I believe, consistent with the Ninth Circuit model instructions. And it really comes down to whether they knew it may infringe, not that it did. I believe the Ninth Circuit has made it clear that

in issues of willfulness close calls go to the plaintiff. And at least as to FlemingPO.exe, Your Honor, there's clear evidence that a jury could find a willful infringement. There is no license that would cure that.

As to the other two claims of infringement under our statutory request, Your Honor, the first as to freight control system, it's clear that Mr. Berry had thought he was going to be the one to make the changes. There's no document in the record that says that they could change the freight database; although, they're going to argue it was implied. But at least a reasonable juror could say, "No, no, no. Mr. Berry was to do that, and you infringed it. And when you did that, you did it knowing that it might infringe his copyright."

We have the letter -- exhibit 16, Your Honor. That's on the FlemingPO. Their own employees are telling them it's infringement back before it started.

THE COURT: Well, that's when he manufactured a license that nobody had agreed to.

MR. HOGAN: Well, I understand that, but if -- even if it was onerous, at least they were aware that there were things out there that were going to cause infringement. They did it anyway.

THE COURT: Did he claim that, yes.

MR. HOGAN: But as to FlemingPO.exe, Your Honor,

the creation of that derivative has no non-willful explanation. I would say the same thing as to the Crystal Reports. If they went in and changed -- it seems like a trivial thing, but in the case like this it's 150,000 trivial thing that they went in and changed it. We know -- we're outside the jury. We know why they did it, Your Honor. We know why. They did it because they were taking the money from the invoices. Now, the jury doesn't get to hear that, but can we say that that wasn't willful?

THE COURT: Because they were doing what?

MR. HOGAN: They changed -- they went in and took API's receivables. They changed the name.

MR. SMITH: Counsel is now arguing the subject that the court has already ordered us to arbitration on and that the plaintiff has refused to go to arbitration on, Your Honor.

MR. HOGAN: The point I'm trying to make, Your Honor, is it's one thing that if one takes a piece of computer software, thinks it's okay to make a backup copy, and then finds out it's not. That would be an innocence infringement. Or if a company finds out that they've got Mr. Berry's software and we write them a letter and say please stop using it and they stop, it's still infringement but it's innocent.

They fought tooth and nail, Your Honor, to keep

that software, knowing that they might be infringers. And I think the jury gets to decide that. Feltner says it's a jury issue, Your Honor, and it never used to be.

THE COURT: How could it be willful when they were using it with permission all the time?

MR. HOGAN: Your Honor, had they made no changes --

THE COURT: Before they had the asset purchase agreement.

MR. HOGAN: Well, API had used it, Your Honor. API had --

THE COURT: For Fleming.

MR. HOGAN: Well, but it was not Fleming's people, Your Honor. They actually were parking API people at Fleming running it.

THE COURT: So what does that --

MR. HOGAN: Well, no one has alleged -- had Fleming made no changes there would be no case here, Your Honor. That's all it's about. They knew they were going to take a chance on infringing --

THE COURT: Well, you heard what the changes were. There were a lot of reports that had no material in them; so they just dropped them. That was one of them.

MR. HOGAN: But the evidence is that that is one of the exclusive rights of ownership, Your Honor. Whether

we like it or not copyrights are unique; it's a monopoly that the owner and the author gets.

THE COURT: That's fine. You can argue that. But to say that it's willful --

MR. HOGAN: I guess the question -- I can't pose it to the court, but I have to pose to myself, Your Honor -- is when would it be willful? When can you in a commercial setting where they've taken -- there's only one copy of this out there.

THE COURT: No, no, no -- well, one copy, yes. Which he installed on their equipment.

MR. HOGAN: He let them borrow a copy. They didn't buy it. He said, "Use it. Get through the holidays."

THE COURT: That's your argument.

MR. HOGAN: That's my argument, Your Honor.

THE COURT: But their argument is they did.

MR. HOGAN: Their argument is, Your Honor, they're asserting the rights of ownership, the right to make a derivative under --

THE COURT: They only did that after he came up with this license idea.

MR. HOGAN: Well, Your Honor, again it's not a question whether they knew for sure it was infringement. It's not proving as if it were a Title 18 violation, Your

Honor. We're talking about a civil case where the jury instruction says it might be -- it might be infringement. It doesn't --

THE COURT: No, no, no, no, no, no, no.

MR. HOGAN: May infringe.

THE COURT: Willful is not might be.

MR. HOGAN: It says whether those action may infringe. They don't have to have the scienter of an evil act. They just have to have a heads up, Your Honor. The instruction makes it clear.

And this is where the small developer making one piece of software -- the easy one is, Your Honor, they take a copy of Windows, they make a thousand copies and sell them at the swap meet. That's easy. Everybody knows that's infringement.

MR. SMITH: It's willful.

MR. HOGAN: It's willful. But when they make numerous copies -- they've said a hundred copies, Your Honor, of the same work were made. Dillon testified to that. He made a hundred separate copies, saved them on the hard drive. That's a hundred copies. He didn't distribute them to anybody. He kept them for Fleming to run a multimillion dollar business and didn't give a dime to the owner of the software. Got to be willful, Your Honor. It wasn't a mistake. Mr. Dillon knew what he was

doing. And I believe, Your Honor, the jury should make this determination. There's evidence to support it. It's critical to Mr. Berry's case.

THE COURT: What's the evidence?

MR. HOGAN: All right. On FlemingPO it's clear that he made -- we have an expert that said he cheated. He said he was -- he committed --

THE COURT: I don't remember him saying that.

MR. HOGAN: He said it was a substantially similar program and that it was plagiarism. That it was -- a copy of Mr. Berry's software was embedded in Mr. Dillon's code.

That claim, Your Honor, isn't -- Fleming isn't saying we made these changes under the license. They're not saying that. They're saying this is not Mr. Berry's software at all.

THE COURT: It would be a lot better if you let them argue their own case. You just argue your case.

MR. HOGAN: All right, Your Honor. So that's as to FlemingPO. Clearly evidence of importing code from one program to another. I've proven access and similarity, and there's got to be willfulness, Your Honor. He knew he was doing it.

As to the freight control system, we talked about that. They knew Mr. Berry had reserved the right --

they never obtained a written license from him to make all these changes. He gave them the cost of making changes.

THE COURT: They thought they'd bought it.

MR. HOGAN: Your Honor, they thought a lot of things. They started off as owners. There's been evidence saying that we're not an owner. It goes around and around, Your Honor. The jury should make the determination.

I think the jury could say that this whole thing it shows that they were trying to grab his software from day one. If it included an act of infringement, wouldn't that have been willful? I mean how is it that that little -- all the stuff got out with all this, Your Honor, the documents?

THE COURT: It's amazing how we can view the same case in different ways.

MR. HOGAN: Exactly, Your Honor.

THE COURT: It looks like Fleming bailed out API, and so they wound up with one of API's employees suing them for having bailed them out. Willful.

MR. HOGAN: But it's infringement, Your Honor. We're not talking about a criminal violation. We're talking about whether or not somebody had a reasonable cause to believe it might --

THE COURT: What's your definition of "willful"?

MR. HOGAN: It says: knew that those actions may infringe the copyright.

MR. SMITH: The Ninth Circuit Peer International versus Pausa Records, Inc., 909 Federal 2d 1332. It defines "willfulness" as, quote, knowledge that the defendant's conduct constituted an act of infringement, end quote. And we took that off the Ninth Circuit's webpage.

There just isn't evidence of willfulness here, Judge. There's evidence that Fleming relied on its license. That's the opposite of willfulness. Willfulness implies that you're doing something --

THE COURT: I'll let Mr. Hogan go to the jury on willfulness.

MR. SMITH: On all --

THE COURT: Yeah.

MR. SMITH: Okay. Thank you, Your Honor.

THE COURT: We've heard your arguments both ways. So reverse all that stuff about taking willful out. Reinstate -- the verdict form (nodding).

MR. SMITH: And, Your Honor, that would be over objection of the defendant.

THE COURT: I should imagine so.

MR. SMITH: Okay. And I gather the instruction on "willfulness" will go back in also.

THE COURT: That's the verdict form as submitted with the insertion of the numbers of the exhibits 221, 222, and 223.

MR. SMITH: And I need to place an objection on the record regarding the instruction on "willfulness," precisely the subject the court and Mr. Hogan were discussing. The instruction on "willfulness" says knowledge that it may infringe --

THE COURT: Submit one.

MR. SMITH: -- and that is not the appropriate -- we will, Your Honor.

THE COURT: And so we'll put back in that willful one, which is the second to the last: "Mr. Berry contends that the defendant willfully infringed the three copyrights. If Mr. Berry proves by a preponderance of the evidence willful infringement, you may, but are not required to, increase the statutory damages for infringement of that work to a sum as high as 150,000.

"An infringement was willful when the defendant engages in acts that infringe the copyright and knew that those actions may infringe the copyright."

MR. SMITH: And our objection is to the word "may," Your Honor. That ought to be at least -- if not "will" infringe the copyright, at least "were likely to" infringe the copyright.

THE COURT: And knew that those actions infringe the copyright?

MR. SMITH: That's right, Your Honor. That would be the definition of "willful."

MR. HOGAN: I think -- I haven't got the Ninth Circuit's. I can pull them out of my stuff, Your Honor. But I think the Ninth Circuit's model instruction has the "may" language in it, Your Honor. That's not something I drafted.

THE COURT: You just showed it to me a little while ago, didn't you.

MR. SMITH: I think that's correct, Your Honor. I think that language is in the Ninth Circuit's pattern instruction. But the case the Ninth Circuit cites right after that pattern instruction says "knowledge that the defendant's conduct constituted an act of infringement." I think it needs to be more than merely "may" in order to establish willfulness.

(Court reviewing model instruction.)

THE COURT: I think we'll just leave it alone. You can argue. It just gets more complicated.

Now, were there any other instructions that somebody wanted to object to?

MR. SMITH: Your Honor, we had submitted proposed instructions on joint authorship. It's our

position those instructions should be given to the jurors because a significant portion of this work, if not all of it, was done while Mr. Berry was an employee of API, and that would make API a joint author together with Mr. Berry for anything he had done before that.

THE COURT: How is that separate from your argument that he was an employee?

MR. SMITH: It's part of the argument that he was an employee, Your Honor. Even if he created -- even if the jury believes his testimony that he created these products prior to the time he became an employee, he worked on them -- his own testimony establishes he worked on them as an employee extensively, and, therefore, API would be viewed as a joint author together with Mr. Berry.

THE COURT: Well, isn't there an instruction as to ownership?

MR. SMITH: There is a work-for-hire instruction, Your Honor.

THE COURT: Yeah.

MR. SMITH: So that that would -- you're correct. And that would leave the possibility that the jury could conclude that he worked from 1996 to '99 -- all of that work was work for hire -- but that he had created something prior to that time before he was an employee.

So that the way to address that is by joint authorship, Your Honor.

THE COURT: I'll leave that to argument.

MR. HOGAN: No instruction, then, Your Honor.

THE COURT: Anything else?

MR. HOGAN: We had the 117 one we had been discussing, Your Honor. I don't think we put that on the record.

THE COURT: Go ahead.

MR. HOGAN: Your Honor, the defendant has -- there is an instruction, and it's in number 46 and 47 out of pages 51. The first 46 begins with, "It is not copyright infringement for the owner of a copy."

Your Honor, these two instructions deal with the 117 defense. First, I'd say to Your Honor it's not raised as an affirmative defense in the answer. There's been no testimony -- credible testimony of any kind that would support this that it was necessary to make these changes. We had discussed, Your Honor, at least the first instruction carries with it the burden of proof and is consistent, I think, with the statutory language.

The second one is taken out of a Second Circuit case, Your Honor, in which there was -- at least before the court where there had been agreement that they could make changes. That case dealt with where there had been

an agreement to make changes. Not in this case, Your Honor, where that's a contentious issue, obviously.

I'd say if the court is going to put in a 117 defense, it would be over objection because it wasn't raised as an affirmative defense. The case is closed for the defendant to amend. And, secondly, Your Honor, it is going to be so confusing to the jury as to what this all means because, frankly, we sit here and, you know, like minds differ as to what the statute means and we don't understand what it means. How is the jury ever going to be able to fathom this 117 defense?

It's noteworthy, Your Honor, there is no model instruction in the Ninth Circuit. We're going into unchartered waters on this one, Your Honor.

THE COURT: It makes a good case for the Ninth Circuit.

MR. HOGAN: I understand that the court would never back away from that, Your Honor, but I'm saying that it should be a better case than this, one in which it was raised as a defense and in which maybe an expert or two had a chance to chime in on it. We haven't had any of that, Your Honor, and I think it just makes mischief. At least if one's going to get in, I would say the first one is the least offensive because at least it tracks the statutory language, Your Honor.

MR. SMITH: Once again referring to Aymes versus Bonelli, United States Court of Appeals for the Second Circuit. Contrary to counsel's representation, in that case the author of the software was trying to do exactly what Mr. Berry is doing here: he was trying to sue the party that he wrote the software for, claiming they made changes that he wanted to make himself.

And in that case the Second Circuit said copyright laws should reflect the fact that transactions involving computer programs are entered into with full awareness that users will modify their copies to suit their own needs. This right of adaptation includes the right to add features to the program that were not present at the time of rightful acquisition.

This is all cited in connection to the basis for 17 U.S. Code Section 117. That's the reason we submitted these instructions. We believe we're entitled to them. We propose adding to the second instruction the one that begins, "The owner of a copy has software -- of software has the right to make modifications." We propose adding a sentence that says, "The party relying on this defense bears the burden of proving by a preponderance of the evidence that it is the owner of a copy of the software."

MR. HOGAN: If I may, Your Honor, the essential step language -- first, there's another problem. The My

System case says you can't be an owner of a copy and a licensee at the same time. It's a Ninth Circuit case, Your Honor. It's been cited numerous times in these proceedings.

It create a quandary for us. Are we going to have another instruction that says, if Fleming argues they have a license, they can't argue they own a copy?

This instruction, Your Honor, is simply -- the easy way to fall back is it's not in the answer, Your Honor. It is a new defense not properly before the court. It creates havoc when -- does anyone in this room actually know for sure what that statute means, Your Honor? We haven't -- it hasn't been put before the Ninth Circuit. This Aymes versus Bonelli case --

THE COURT: Which instruction is it again? I'm trying to find it.

MR. HOGAN: In the stack we have, Your Honor, it was 46 and 47 of 51.

MR. SMITH: Fifth from the end, Your Honor, by my count. It begins with --

THE COURT: Okay. Go ahead.

MR. SMITH: It begins with, "The owner of a copy of software."

THE COURT: Yeah, that's what I thought I was reading. And then you're going to put a burden of proof

on it.

MR. SMITH: That's right.

THE COURT: I thought we argued that one already.

MR. HOGAN: Not on the record, Your Honor. That was in our informal pre-argument, Your Honor.

I guess the second one is -- if we're going to put a 117 instruction, Your Honor, at least let's put the one in that contains the statutory language. We're going out creating a new instruction. Let's give Congress a shot at it. They didn't make up the second one, your Honor.

THE COURT: What is the statutory language that you're holding out for?

MR. HOGAN: The statute, Your Honor, I believe was in -- I created an alternative instruction that I believe tracked the statute. Although, admittedly, I wrote it. That would not obviously --

MR. SMITH: The statute says, Your Honor, that the changes made need to be an essential step in the utilization of the program. The case law says what this instruction says, which is it includes the right to add features to the software that were not present at the time of rightful acquisition.

MR. HOGAN: Your Honor, I'll read my proposed

117 defense instruction: "If you find that Fleming did not have a license and was an owner of a lawfully obtained copy of plaintiff's software and you find that each and every one of the changes that Fleming made to plaintiff's software were necessary to allow the software to run on its machine, you may find that Fleming was authorized to make any such necessary changes. Any unnecessary changes you find -- any unnecessary changes you must find were willful infringement.

"Fleming bears the burden of proof by a preponderance of the evidence to show that it owned a lawful copy of plaintiff's software and that each and every change it made was necessary to allow the software to run on it's -- and it's a typo -- on its machine. If Fleming admits it made changes to plaintiff's software and these changes were not all necessary to allow the software to run on its machine, then you must find that Fleming was a willful infringer."

MR. SMITH: Judge, that's not what the case law interpreting the statute says.

THE COURT: Well, I'll deny that plaintiff's proposed instruction number 8 that you just read, and I'll stick by my ruling on instruction number 117 -- number --

MR. SMITH: It's 47 on the fax copy, Your Honor. Thank you, Your Honor. And we will add the sentence --

THE COURT: With the addition of that burden of proof, which you have given to Emily.

MR. SMITH: We will provide it to the court staff.

THE COURT: Any others?

MR. HOGAN: No, Your Honor.

MR. SMITH: Nothing else, Your Honor.

THE COURT: How much time do you want to --

MR. SMITH: Judge, we do have a typographical error on page 41 of the faxed instructions.

It says, "A breach of contract may be total or partial. If the breach is total, the injury party has a right," and it should be "the injured party." And I think that probably was an error that was on the form we submitted.

THE COURT: You got that?

LAW CLERK: Yes.

THE COURT: Any problem with that?

MR. HOGAN: No, Your Honor. That's fine. No problem, Your Honor.

THE COURT: The "injury" party should be "injured" party.

MR. SMITH: That's right, Your Honor.

THE COURT: So how much time you want to rest before you start your argument?

MR. HOGAN: Couple minutes, Your Honor.

THE COURT: 10:30?

MR. HOGAN: That would be fine, Your Honor.

THE COURT: So we'll recess until 10:30. You might tell the jurors to prepare for argument.

Now let me ask you again. I have a notice of election of statutory damages.

MR. HOGAN: Yes, Your Honor.

THE COURT: You're going to stick with it.

MR. HOGAN: We're sticking with it, Your Honor.

THE COURT: Okay. It's filed, and you can hang on to it, Leslie.

THE CLERK: Thank you, Your Honor.

THE COURT: Let me say that I'm following that New York case -- what was the New York case again? Which attempted to make some sense out of the Supreme Court's decision. We find down here at the trial level that appellate courts come out with fine language which leaves us the problem of applying it to real situations.

Alexander versus Chesapeake, Potomac, and Tidewater Books, Inc., 60 F. Supp. 2d 544. That's the one that said "With respect to the selection that under the Copyright Act the plaintiff may elect to receive statutory or actual damages, Alexander did not elect statutory

damages before the case was submitted to the jury. Therefore, only actual damages are available to Alexander, which he now requests in the form of an award of Modrak's profits from the infringement pursuant to the Copyright Act. This section of the Copyright Act provides that a copyright owner is entitled to recover the actual damages suffered by him, et cetera, et cetera.

"This section further provides that in establishing the infringer's profits, so forth, so on.

Where's the election coming in? Where did they say that they had to do it before --

LAW CLERK: Just the blurb that you just read.

THE COURT: Near the end?

(Court and law clerk conferring.)

THE COURT: Anyway, the election has to be made before going to the jury.

THE COURT: You want me to instruct before closing argument or after?

MR. HOGAN: I would prefer before, Your Honor.

MR. SMITH: I guess I'd prefer after, but I won't object if the court's inclined to do it before. Either way is fine, Your Honor.

THE COURT: I'll do it after because we have to do a little literary work on it.

Okay. We'll recess till 10:30, at which time

we'll call the jury.

(Short break in proceedings.)

THE COURT: Go ahead.

MR. HOGAN: Your Honor, Timothy Hogan on behalf of the plaintiff moves for a judgment as a matter of law on the issue of copyright ownership of the subject software. Specifically, Your Honor, there's been no evidence presented to rebut Mr. Berry's prima facie showing that he created the software in 1993 for FlemingPO.exe and the freight control system.

I'd also move for a directed verdict on the Section 117 defense.

THE COURT: Judgment as a matter of law.

MR. HOGAN: Judgment as a matter of law as to the section 117 defense that there's been no issue to support the defense -- there's been no evidence to support the defense.

THE COURT: Both denied.

MR. HOGAN: Thank you, Your Honor.

THE COURT: Both denied.

MR. HOGAN: Thank you.

(Court recessed at 10:15 A.M., until 10:51 A.M.)

(Partial transcription concluded.)

COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, May 26, 2005.

DEBRA KEKUNA CHUN

RPR, CRR